Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1370

PHILIP JAY FETNER,

Petitioner,

v.

FEDERAL LAND BANK OF BALTIMORE,

Respondent.

SUPPLEMENTARY APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO TO THE SUPERIOR COURT OF PENNSYLVANIA

PAUL R. BECKERT, JR.
JACKSON, SULLIVAN & BECKERT
312 Oxford Valley Road
Fairless Hills, Pennsylvania 19030
Attorney for Petitioner

Washington, D.C. • THIEL PRESS • (202) 638-4521 80-1384

IN THE
COURT OF COMMON PLEAS
OF BUCKS COUNTY

Civil No. 77-2577-04

Mortgage Foreclosure

FEDERAL LAND BANK OF BALTIMORE

v.

PHILIP JAY FETNER

OPINION

In this mortgage foreclosure action, defendant has appealed to the Superior Court from our entry of a Decision, after trial without jury, in favor of plaintiff and against defendant in the sum of $137,195.45, together with interest and costs of foreclosure, and from our dismissal of defendant's Exceptions thereto.

In its complaint plaintiff alleges a straightforward real estate transaction under which defendant borrowed from plaintiff the sum of $117,500.00 secured by a mortgage upon some twenty five acres, with improvements erected thereon, some twenty five acres, with improvements erected thereon, located in Nockamixon Township, this County. Alleging default in payment of monthly installments from July 1, 1976 to February 1, 1977, totalling $8,106.36, and further alleging defendant's failure to pay real estate taxes in the sum of $1,659.16, plaintiff exercised its right of acceleration under the terms of the mortgage and demanded judgment for the unmatured principal, monthly installments

due, interest, real estate taxes and attorney's commission, totalling $137,195.45.

In a prolix Answer, New Matter and Counterclaim, defendant, inter alia, denied that the instrument sued upon "is a mortgage", denied having defaulted, denied that real estate taxes were due "under the terms of the mortgage" and alleged "that after reasonable investigation", defendant had been unable to gain sufficient knowledge from which to form a belief as to the truth of the averment that the amount claimed was due plaintiff.

Defendant's New Matter and Counterclaim contain 169 paragraphs. In New Matter defendant alleges that Federal Land Bank of Baltimore does business within the Commonwealth of Pennsylvania and is in violation of the registration requirements imposed upon foreign corporations under 15 P.S. 2014. He challeges the attorney's fee of 10% provided for in the agreement, alleging that it is excessive. He acknowledges that he had made a long-term "residence home loan". And, finally, he incorporates by reference an Amended Complaint in a non-related action brought by defendant against his grantors, Dr. Stewart Haggerty and Martha Haggerty, his wife, Commonwealth Land Title Insurance Company, and Doylestown Title and Abstract Co., Inc., which companies issued title insurance at the time of his purchase on October 9, 1974, the Estate of Elizabeth James, deceased, who had traded as Elizabeth James Country Real Estate and was the realtor who handled the sale and assisted in securing the mortgage loan, and the Commonwealth of Pennsylvania, Department of Transportation, condemnor of an easement over the land.

In Count I of his counterclaim against plaintiff defendant, an attorney-at-law, then incorporated by reference the substance of his Answer and New Matter

and alleges, in substance, that plaintiff fraudulently concealed from him its knowledge of an easement granted Penndot prior to his settlement. He thereupon claimed damages from plaintiff "in excess of the sum of $250,000.00 or in the alternative $180,000.00, and in addition thereton punitive damages in the sum of $500,000.00, together with costs of suit and legal interest". Ten more counts follow.

Count II alleges that for some time past defendant had "repeatedly questioned" the accuracy of statements of his account received from plaintiff, alleged that statements had been sent "too late to pay the amount owed or some time not at all", claimed that defendant had repeatedly asked plaintiff to discuss discrepancies but that such requests had been refused by plaintiff, and alleged that he therefore was unable to determine "what amounts if any are due". Defendant then alleged that "it is clear that plaintiff has acted in bad faith in its dealings with him" in order "to create a delinquency and force a foreclosure so as to avoid and moot the litigation regarding the purchase of the property, in which plaintiff was fraudulently involved".

Defendant asserts that plainstiff's "actions" (presumably its alleged mailing of statements and refusal to discuss the account with defendant) were "intentional, wilfull and malicious, and done, in part, for the purpose of forcing defendant out of said property". These actions of plaintiff, defendant claims, cost him "substantion time, numerous legal fees and expense, great aggravation, . . . possible loss of property", and "extensive credit problems" which led him to demand, in Count II, compensatory damages of $200,000.00 and puntive damages of $500,000.00.

Here it would be appropriate to refer to the litigation in which defendant herein seeks recovery against his grantors, the title insurance companies, the realtor, and the Commonwealth. In essence plaintiff therein avers that the realtor served as an agent for him in his search for "a suitable and secluded gentleman's country estate and horse farm in the Bucks County area" and had prior to the execution of the agreement of sale with the grantors on June 5, 1974, informed the defendant that the many trees, shrubs and planting on the property, setting the natural boundaries thereof, gave it that "certain beauty, unique privacy and distinct character" which was "especially suitable for the gentleman's country estate and horse farm" that the defendant was looking for. Then, alleging the execution of the agreement of sale with the grantors, defendant alleges that he sought title insurance through the title company defendants, and secured a preliminary title report from them on June 10, 1974. He then alleges that thereafter, on July 29, 1974, and subsequent to the execution of the agreement of sale, his grantors "covertly and in contravention of the terms of the agreement", executed a deed of easement which conveyed to the Commonwealth of Pennsylvania, Department of Transportation more than 7,000 square feet of land covered by trees and shrubs, a part of the natural boundary of the property. He went on to aver that the deceased realtor had represented to him that no highway expansion was planned on or near the property and that relying upon the alleged misrepresentation of the deceased realtor he took possession of the property only to learn thereafter that a planned expansion by PennDOT was well known to area residents prior to the execution of the agreement. Defendant concluded that his grantors thus acted fraudulently.

Defendant, in that action, went on to allege that prior to his settlement on October 9, 1974 the defendant title insurance companies issued its policy of insurance without reference to the deed of easement referred to above which, he averred, had been recorded on October 1, 1974. He termed the title companies "grossly negligent", the grantors the "perpretrators of fraud", the Commonwealth as "co-conspirators" with the grantors as well as "trespassers" who maliciously destroyed certain trees on the property "and consequently severely altered the character of the property and thereby greatly reduced the value thereof".

Defendant sought by way of Count I of the collateral action against his grantors and others (a) compensatory damages in the sum of $180,000.00 (the purchase price of the property), plus all interest thereon paid by defendant plus costs and expenses incurred by him in connection with his intended rescission of the agreement, (b) the sum of $50,000.00 for reimbursement for alleged improvements made by this defendant to the property and (c) punitive damages in the sum of $500,000.00 for "gross, wilfull, wanton, malicious and fraudulent misrepresentation [of his grantors, *et al.*] which have irreparable damaged plaintiff". Alternatively in Count I of the collateral action, this defendant sought damages in excess of $150,000.00 which allegedly represented "the true replacement value of the destroyed trees, shrubs and plantings" and punitive damages in the sum of $500,000.00 for those defendants' alleged gross, wilfull, wanton and malicious and fraudulent misrepresentations.

Count II of this defendant's said complaint incorporates by reference a substantial portion of Count I within it and seeks damages from the defendant title

insurance companies in a sum in excess of $100,000.00 for breach of contract in failing to discover the deed of easement allegedly conveyed to his grantors by PennDOT and allegedly recorded October 1, 1974.

Now, we return to the present action. Count III incorporates into this unusual mortgage foreclosure another dimension and, of course, incorporates by reference much of the Answer, New Matter and Counterclaim which preceded and followed those allegations in Count III. Here defendant states that in November 1974, "as a result of exposing corporate overseas bribery and a dispute with his [defendant's] employer, defendant was forced to leave his position as a result of a dispute with his employer", which left him without a regular source of income. It is then alleged that upon being informed by defendant of these problems, plaintiff had told him it would, if necessary, give him the time needed to establish his "income flow" and thereupon defendant relied upon such assurances and made further improvements to the property as well as "substantial investments in new business ventures".

He then complains in Count III of his counterclaim that although late in making his July 1975 payment he had requested that plaintiff not release information concerning the overdue nature of the account and, as well, requested that "all communications with Defendant in *Fetner v. Haggerty, et al.* be very circumspect".

Plaintiff agreed, according to defendant, but notwithstanding such agreement had disclosed to a prospective lender from whom defendant sought short-term financing that the mortgage payments were indeed three months overdue and that it was considering some type of legal action. As a consequence, said defendant, "all financing fell through" and moreover his grantors' attorney learned

that foreclosure proceedings were imminent as a result of which "all serious settlement discussions were terminated by them." Concluding that such alleged disclosures made by plaintiff were in violation of the Federal and Pennsylvania Truth in Lending Act and Fair Disclosure of Credit Act, and "related statutory provisions", in violation of a duty owed by plaintiff to defendant and in violation of "agreements and understandings" made between plaintiff and defendant, defendant alleged that plaintiff's actions were for the purpose of forcing a foreclosure in order to render moot and conceal the "original fraud". For this behavior as well as for his loss of credit, "economic losses relating to his profession", etc., defendant demanded judgment of the additional sum of $275,000.00 against his mortgagee by way of compensatory damages, and $700,000.00 in punitive damages.

Count IV relates to matters preceding the mortgage commitment and at settlement. Specifically defendant complains that plaintiff did not afford him with 80% financing which he had allegedly been told was available, but instead offered him 60% financing which due to the pressure of time, he alleges, he was obliged to accept, all to his detriment. He also complains of plaintiff's requirement concerning secondary financing. Alleging that plaintiff's representation concerning interest rates and representations concerning separate secondary financing were false and fraudulent and made "with the intent to deceive and defraud defendant and to induce him to obligate himself to plaintiff for mortgage financing", defendant in this Count demands judgment of $50,000.00 in compensatory damages.

In Count V of the counterclaim defendant asserts that both in 1975 and 1976 plaintiff, without advance notice

to defendant, paid school taxes due upon the mortgaged real estate and then demanded reimbursement for the sums paid together with interest all the while knowing of defendant's "cash flow problems". These school tax payments made by plaintiff, according to defendant, were made in order that there might be justification to foreclose and deprive defendant of the property and to "moot and conceal the original fraud by plaintiff". Accordingly, defendant demanded $100,000.00 in compensatory damages and $500,000.00 in punitive damages.

In Count VI defendant avers that he is a "good, honest and virtuous citizen who was an esteemed member of the community in credit and reputation". Alleging that plaintiff's "actions" injured his good name, fame and reputation resulting in his loss of credit, economic harm, humiliation, embarrassment, aggravation, etc., defendant demands judgment of $400,000.00 in compensatory damages, together with $700,000.00 punitive damages.

Count VII alleges that certain provisions in the mortgage which he had signed were "unconscionable, illegal and/or unenforceable" and were inserted in the mortgage, as defendant sees it, with some malicious intent, thus entitling him to judgment against plaintiff in the sum of $50,000.00, compensatory damages and $500,000.00 in punitive damages.

In Count VIII defendant expressed the belief that plaintiff, prior to settlement had in its possession a survey of the property and a preliminary title report which it failed to reveal to him in breach of a duty owing him. And alleging that such behavior on the part of plaintiff, his mortgagee, was intentional and malicious, designed to cause him substantial harm, defendant asks this Court to award him the sum of

$250,000,00 compensatory damages and $500,000,00 punitive damages.

Count IX states that on August 10, 1976 defendant sent plaintiff a check in the amount of $2,000.00 which had not been credited to his account and avers that plaintiff refused to check its records to determine whether such payment had been received, as a result of which defendant was forced to spend time and legal fees, with the further result that he suffered losses in time from his business and loss of credit. Since this behavior on the part of plaintiff was also averred to have been intentional, malicious and wanton and to create a foreclosure posture, defendant asked for judgment of $50,000.00 compensatory damages and $250,000.00 punitive damages.

In Count X of his counterclaim defendant complains, in essence, that although it had been represented to him that plaintiff had a very lenient attitude in the event "any payment problems would arise", nonetheless when defendant's "cash flow problems" presented themselves, plaintiff went ahead with its foreclosure action. Defendant recites at great length the efforts that he had made to forestall foreclosure and charges plaintiff with having acted fraudulently and the the malicious intent to "moot the question of the original fraud", all to his great damage. Wherefore he claimed once more of plaintiff the sum of $200,000.00 in compensation and $1,000,000.00 in punitive damages.

Finally, in Count XI, after incorporating paragraphs, one through one-hundred seventy of the Answer, New Matter and Counterclaim (Count XI is initiated with paragraph 171) defendant charges plaintiff with having violated certain provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. He

further charges the plaintiff's failure to inform him of the existence of an easement across the property, financed by plaintiff for defendant, was a fraudulent omission of a material fact contrary to the 1934 Act. The prayer for relief under Count XI calls for the "rescission of the entire loan transaction, refund of all interest paid, and damages in the amount of $500,000.00 both pecuniary and punitive . . . ."

So that it might not be thought that the writer of this opinion may be guilty of that prolixity which he finds in defendant's Answer, New Matter and Counterclaim, let it be said that he deemed it necessary to outline defendant's pleadings in as succinct a fashion as possible (under the circumstances) in order that the Superior Court might better understand the events which took place at the trial of the matter and which are here submitted for scrutiny.

The Superior Court may be asked to review the total of forty-six Exceptions filed to the proceedings in all of its aspects. Defendant has not favored us with a statement of the precise matters complained of but we shall assume that he will brief and argue all issues excepted to. We shall address but a few of them and even these which we mention, in our opinion, are without merit on their face. It should be added, gratuitously, that had plaintiff submitted a motion for a summary judgment upon the pleadings prior to the trial, it would have been granted forthwith. That was not done. Hearing was scheduled and held.

The record will reveal that two witnesses were offered by plaintiff through whom the mortgage bond, and so-called real estate mortgage bond were introduced and received in evidence. Testimony established that the Federal Land Bank was chartered under an Act of Congress in 1916 and under the Farm Credit Act of

1971. It receives no Federal funds from the government and exists in order to make mortgage loans to farmers.

A "statement of debts" of this defendant was also received into evidence which reflected that his total debt as of February 15, 1978 (the date of hearing) including unmatured principal of $112,600.00, various installments due, tax insurance advances, fire insurance advances, interest to October 14, 1978 and attorney's commission, totalled $147,906.97.[1] The last payment made by this defendant upon his mortgage obligation was July 6, 1976, one year and seven months prior to the hearing. He has remained a resident of this "gentleman's farm" throughout this period of default. During cross-examination of plaintiff's witnesses, defense counsel made numerous effort to inquire into all manner of matters not germane to the foreclosure question (See e.g., N.T. pp. 42-46). This was not permitted.

After plaintiff rested its case defendant called an agent of the plaintiff who dealt with defendant when he sought the mortgage loan. In connection with counsel's examination of this witness the hearing judge, for the first of many times thereafter during the long day, suggested to defense counsel that having alleged fraud in various manners on the part of plaintiff, he should set about proving it. (N.T. p. 52). Objection after objection was sustained by the trial judge to questions which went neither to plaintiff's right to foreclose nor to the alleged fraud. (See e.g., N.T. pp. 99 through 112). At that point further examination of plaintiff's agent was denied defense counsel. Of this defendant complains. We shall respond to that complaint merely with a suggestion that a review of counsel's examination of the witness will amply justify the Court's action.

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[1] "Our decision erroneously stated $137,195.45, the amount originally claimed".

Thereafter the defendant testified. He was given great latitude. Once again, after sustaining countless objections to questions put to defendant by his counsel concerning matters which related neither to the proven default nor to the alleged fraud, the trial judge urged defendant's counsel to restrict himself to the facts averred which would tend to prove the alleged fraud if indeed it existed. No evidence was forthcoming and we are satisfied that none existed. The extravagant representations made by this defendent in his lengthy Answer, New Matter and Counterclaim speak for themselves. The defendant was given every opportunity to testify to facts which arguably might lead to a conclusion that this plaintiff had any interest in this defendant different from the interest it has any other borrower; that is to say, an interest other than that of having sufficient security for the loan it advanced and an interest in having its contractural payments made when due.

Accordingly, the Court refused to hear further testimony from the defendant, being satisfied that the testimony offered was as lacking in merit, and at times in credibility, as was the defendant's pleading. Few reported cases discuss defenses and counterclaims in mortgage foreclosure actions. Certainly, payment, fraud in the inducement, want of consideration, release, setoff, and denial of execution of the mortgage, may be pleaded by way of defense in answer to a complaint in foreclosure. P.L.E. Mortgages, Section 225. On the issue of fraud, Section 225 states:

> "If defendant intends to insist on a fraud in fact, it is not sufficient to allege in the answer facts from which an inference of fraud may be drawn. Fraud must be charged distinctly".

Counterclaims in foreclosure actions are governed by Pa. R.C.P. 1148 which states:

> "A defendant may plead a counterclaim which arises from the same transaction or occurrences or series of transactions or occurrences from which plaintiff's cause of action arose".

According to 3A Anderson, Pa. Civ. Prac. Section 1048.4 and 1048.5, a defendant may properly counterclaim for damages for breach of warranty of title, or for any unliquidated claim which the parties had agreed to adjust when the mortgage came due, but, defendant may not counterclaim for unliquidated damages from torts unrelated to the mortgage action. In briefing the question counsel have referred us to very few cases which speak to the specific matters before us. In *First Federal Savings and Loan Association v. Street Road Shopping Center Inc.,* 68 D. & C. 2d 751 (Bucks 1975), affirmed 238 Pa. Superior Ct. 770 (1975), it was held that a mortgagee does not waive its right to foreclose by accepting late payments. It was further held that in that case a 5% attorney's fee was reasonable where the debt exceeded $300,000.00. In *Kornicki v. Abrams,* 28 Bucks Co. L. Rep. 215 (1976), it was held that a mortgagee is under no duty to inspect the premises to be mortgaged.

On the issue of taxes, counsel for plaintiff has referred us to *Pennsylvania Trust Co. v. Earnest,* 128 Pa. Superior Ct. 331 (1937), wherein it was held that it is proper for a mortgagee to pay taxes when they become delinquent. Unfortunately, on the issue of fraud, counsel have referred us to no mortgage foreclosure case dealing with factual averments which are even vaguely similar to the one at hand and none have been found. No doubt none exist nor will hereafter arise.

We believe that the 10% allotted for counsel fees is appropriate in this case. Such fees have been previously allowed. See *Plum Tree Inc. v. Seligson,* 224 Pa. Superior

Ct. 471 (1973); *Mack v. Fennell,* 195 Pa. Superior Ct. 501 (1961). Such attorney's fees are properly includable in a judgment and belong to a plaintiff. *Commonwealth v. Pennsylvania Loan Corp.,* 127 Pa. Superior Ct. 253, 256 (1937). True, such fees must be reasonable. However, reasonableness must be determined by the circumstances of each case as stated in *Foulke v. Hatfield Fair Grounds Bazaar, Inc.,* 196 Pa. Superior Ct. 155, 160 (1961), at page 160:

> "The mortgagee, having loaned a fixed sum of money should recover both principal and interest without diminution for expenses which he might be forced to pay."

The extent of services rendered by counsel in this case, given the fact that the complaint was filed on March 16, 1977, given the fact that defendant chose to file his meritless Answer, New Matter and Counterclaim, take lengthy depositions thereon, demand trial in an effort to forestall foreclosure, and given the fact that counsel was obliged to engage in lengthy preparation for trial, as well as spend a day on trial, satisfies us that the counsel fee allowed is reasonable under the circumstances. It should be added, obviously, that defendant has now appealed to the Superior Court. In this connection counsel is called upon to brief and argue plaintiff's position before that Court, thus leading to substantial additional expense to plaintiff for counsel fees.

In brief, it is the writer's judgment that this defendant has acted in bad faith from the inception of the mortgage foreclosure action. Since July 1, 1976 to date, as was acknowledged on July 25, 1978, defendant has continued to enjoy residence and conduct a business at the foreclosed real estate, while plaintiff-mortgagee continues to advance funds for the payment of real estate

taxes, and necessary insurance. He has not pleaded a valid defense to the foreclosure action and has not proved one. While having pleaded fraud at great length in his New Matter and Counterclaim, it is quite obvious that there is no substance in the same.

For these reasons we entered judgment against defendant.

BY THE COURT:

/s/ F. F. Bodley
Judge

September 8, 1978